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IN THE

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

v.

RONALD M. PRUPIS, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

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September 17, 1999

BEST AVAILABLE COPY

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Pursuant to Rule 37.3(b) of the Rules of this Court, Washington Legal Foundation and Allied Educational Foundation respectfully move this Court for leave to file the attached brief as *amici curiae* in support of the respondents. The petitioner has consented to the filing of this brief as has each of the respondents except for respondent Ronald M. Prupis. Mr. Prupis, who is in bankruptcy proceedings, has indicated that, on advice of his bankruptcy counsel, he will not participate in this case. Mr. Prupis's withholding of consent necessitates the filing of this motion.

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in

Washington, D.C., with supporters nationwide. WLF devotes substantial resources to litigating cases and publishing educational materials that promote, *inter alia*, a limited and accountable government, the proper role of the judiciary, civil justice reform, and reasonable government regulation.

To that end, WLF has appeared before this Court as well as other federal and state courts to argue against overly expansive theories of tort liability, excessive punitive damages, and imposition of unwarranted attorney fee awards. Of particular relevance to this case, WLF has appeared as *amicus* in this Court arguing against an overly expansive interpretation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961, *et seq*. *See, e.g., H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989); *Rotella v. Wood*, 147 F.3d 438 (5th Cir. 1998), *cert. granted,* 67 U.S.L.W. 3559 (U.S. Mar. 8, 1999) (No. 98-896).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* along with WLF in numerous cases before this Court, including *Rotella v. Wood*.

WLF and AEF are concerned that the reflexive invocation of RICO by civil litigants engaged in otherwise garden-variety commercial disputes does violence to the original purpose of RICO and unnecessarily burdens our federal judicial system. While Congress adopted RICO as a tool to fight organized crime, civil RICO is now invoked primarily in "everyday fraud cases brought against respected and legitimate enterprises." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985). The instant case presents another example of the attempt by litigants to stretch the application of RICO further than what Congress intended. WLF and AEF believe that

their participation in this case as *amici curiae* will assist the Court in resolving the issues presented.

Accordingly, WLF and AEF respectfully request that they be granted leave to file the annexed brief.

Respectfully submitted.

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QUESTION PRESENTED

Whether 18 U.S.C. § 1964(c), which gives a civil cause of action to persons "injured" by a "violation" of the criminal provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1962(a)-(d), authorizes civil suits for a "violation" of the RICO conspiracy statute, 18 U.S.C. § 1962(d), even though "violation[s]" of that criminal statute harm only the public at large and do not "injure" any particular individual.

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BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENTS

Washington Legal Foundation and Allied Educational Foundation respectfully submit this brief *amici curiae* in support of the respondents.

INTERESTS OF *AMICI CURIAE*[1]

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are set forth in the preceding Motion for Leave To File Brief *Amici Curiae*.

STATEMENT

This case arises out of the bankruptcy proceedings of Southeastern Insurance Group (SIG), a Florida-based holding company that owned various subsidiary businesses, including subsidiaries that issued surety bonds to construction contractors. Respondents are former directors of SIG. Petitioner, a former president of SIG, sued respondents under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et. seq.*, alleging, *inter alia*, that respondents conspired to violate RICO, *see* 18 U.S.C. §§ 1962(d) & 1964. The United States District Court for the Southern District of Florida entered summary judgment against petitioner. The court

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[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than *amicus* Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

of appeals affirmed. *See Beck v. Prupis*, 162 F.3d 1090 (11th Cir. 1998).

1. In 1983, petitioner was hired to serve as SIG's president. He also became a member of SIG's board of directors. Petitioner claims that for the first five years of his tenure, unbeknownst to him, several of SIG's officers were committing a series of unlawful acts, including embezzling corporate funds, violating promises to indemnify contractors, and giving deliberately falsified financial statements to SIG's creditors and shareholders.

In 1988, petitioner purportedly became aware of this alleged misconduct and informed insurance regulators about improprieties in SIG's financial statements. According to petitioner, the other directors, afraid that he might expose their misdeeds, engaged an outside consulting firm to criticize his performance as CEO so as to furnish an excuse for firing him. The consulting firm's report recommended that much of senior management be fired for poor performance. In May 1988, petitioner and other officers of SIG were fired.

2. One year later, petitioner sued SIG's directors in Florida state court alleging claims under that state's RICO statute and under Florida common law. That case was eventually dismissed. Meanwhile, the New Jersey State Insurance Commissioner had brought a shareholder derivative action against SIG and its officers—including petitioner—in New Jersey federal court. Petitioner filed a cross-claim, naming as defendants SIG and respondents. The cross-claim alleged four counts under the federal RICO statute and six state law claims. After SIG filed for bankruptcy protection, petitioner's cross-claim was transferred to the United States District Court for the Southern District of Florida.

Petitioner's cross-claim alleges that SIG's officers fraudulently induced him to make a series of harmful financial decisions by neglecting to inform him about their misdeeds or his imminent dismissal. Those decisions

included: purchasing $75,000 worth of SIG stock, making SIG an unsecured personal loan of $150,000, and joining other directors in personally guaranteeing SIG's $7.5 million bank loan. Petitioner claimed that those inducements, as well as the creation of fictitious reasons for his firing, constitute mail fraud, *see* 18 U.S.C. § 1341, and wire fraud, *see* 18 U.S.C. § 1343, on the part of the respondents, and that the combination of these offenses constituted a "pattern of racketeering" under the federal RICO statute.

Relying on 18 U.S.C. § 1964(c), petitioner asserted a private cause of action for a violation of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d), alleging damages on the theory that his refusal to participate in and partial disclosure of respondents' alleged activities resulted in his termination.

3. The district court granted respondents' motion for summary judgment, holding, in part, that petitioner could not maintain an action under RICO, because the injury he alleged did not stem from a predicate act of racketeering. The Eleventh Circuit affirmed, holding that a civil RICO conspiracy plaintiff must allege that he was injured by a predicate act of racketeering, not merely by any overt act in furtherance of the RICO conspiracy.

SUMMARY OF ARGUMENT

The court of appeals correctly dismissed petitioner's RICO conspiracy claim. RICO's civil suit provision, 18 U.S.C. § 1964(c), affords a cause of action only to persons "injured" in their business or property by reason of a criminal "violation" of section 1962. 18 U.S.C. § 1964(c).

Petitioner contends that he was "injured" by reason of a "violation" of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d). That claim is meritless. Petitioner has not been injured by any conduct constituting the "violation" of § 1962(d)—*i.e.*, an unlawful *agree-*

ment—but by something altogether different: an overt act purportedly taken to further that alleged conspiracy. In *Salinas v. United States*, 522 U.S. 52 (1997), this Court held that a section 1962(d) offense consists of a conspiracy *simpliciter*, and that an overt act is neither an element of the offense of conspiracy nor conduct constituting that offense. *Id.* at 63-65. Accordingly, petitioner's injury, which allegedly flows from an act in furtherance of the conspiracy, but not from the conspiracy itself, did not result from a "violation" of RICO's criminal conspiracy provision, 18 U.S.C. § 1962(d).

To put it another way, petitioner's attempt to dress up his run-of-the-mill wrongful termination claim as a civil RICO cause of action fails because he has not suffered *any* harm by reason of a *violation* of section 1962(d). Respondents' purported "conspiracy"—assuming there was one—did not harm petitioner. Instead, petitioner seeks damages from his *wrongful termination*, an act separate from the unlawful agreement that constitutes the "violation" of section 1962 for which petitioner purportedly has brought suit.

The conclusion that section 1964(c) creates no cause of action for the bare criminal agreement that this Court has held to be the essence of a section 1962(d) "violation" is in accord with Congress's intent in enacting section 1964(c): to provide a remedy for businesses that have suffered concrete harm from racketeering offenses—*i.e.*, for conduct that violates the substantive provisions of the criminal statute, 18 U.S.C. §§ 1962(a)-(c). Congress plainly did *not* intend to effect a fundamental departure from the common law by providing a theretofore unknown federal cause of action for *civil* conspiracy.

In sum, the plain language of the statute, its legislative history, and traditional modes of statutory interpretation all point to the conclusion that petitioner failed to state a cause of action for civil conspiracy under RICO. Petitioner's claim was properly dismissed.

ARGUMENT

RICO DOES NOT CREATE A CAUSE OF ACTION FOR CIVIL CONSPIRACY

RICO's civil suit provision, 18 U.S.C. § 1964(c), affords a cause of action only to persons who have been "injured" by "violation[s]" of the criminal provisions of RICO. The only conduct proscribed by 18 U.S.C. § 1962(d) is a bare *agreement* to commit substantive crimes. That "violation" of law is entirely inchoate and could not cause petitioner or any other specific individual—as distinct from the public at large—any "injury." Because the plain language of the statute demonstrates that petitioner does not have a cause of action for civil conspiracy on the basis of his alleged wrongful termination, petitioner's claim must fail.

A. The Plain Language Of Section 1964(c) Affords A Cause Of Action Only To Persons "Injured" By Reason Of A "Violation" Of RICO's Criminal Provisions

In construing RICO, this Court has consistently emphasized that the statutory language "must ordinarily be regarded as conclusive." *United States v. Turkette*, 452 U.S. 576, 580 (1981); *see also Reves v. Ernst & Young*, 507 U.S. 170, 176 (1993). That principle governs this case. RICO's civil suit provision states that "[a]ny person injured in his person or property by reason of a violation of section 1962 . . . may sue therefor." 18 U.S.C. § 1964(c). Petitioner's claim fails because, under the plain terms of the statute, he has not alleged an injury that proximately resulted from any *violation* of section 1962(d).

1. RICO targets "racketeering activity," which it defines as any act "chargeable" under several generically described state criminal laws and any act "indictable" under numerous specific federal criminal provisions, including mail and wire fraud. *See* 18 U.S.C. § 1961(1).

Section 1962 of Title 18, entitled "Prohibited activities," defines four distinct crimes. Section 1962(a) prohibits using income derived from a "pattern of racketeering activity" to acquire an interest in or establish an enterprise engaged in or affecting interstate commerce. Section 1962(b) prohibits the acquisition or maintenance of any interest in an enterprise "through" a pattern of racketeering activity. Section 1962(c) outlaws participation in the conduct of an enterprise through a pattern of racketeering activity. Finally, section 1962(d) makes it unlawful "to conspire" to violate any of sections 1962(a)-(c).

Congress provided criminal penalties of imprisonment, fines, and forfeiture for violation of these criminal prohibitions. *See* 18 U.S.C. § 1963. In addition, Congress set out a civil enforcement scheme, 18 U.S.C. § 1964, which sets forth in section 1964(c) a private right of action for persons "injured . . . by reason of a violation of section 1962."

2. Section 1962(d), the criminal provision at issue in this case, makes it unlawful "to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." 18 U.S.C. § 1962(d). In *Salinas v. United States*, 522 U.S. 52 (1997), this Court held that the phrase "to conspire" bears its "ordinary meaning and definition;" accordingly, the Court held that a RICO conspiracy offense is fully accomplished when the conspirators reach agreement to further a criminal endeavor. *Id.* at 63, 65. Under section 1962(d), as at common law, "[t]here is no requirement of some overt act or specific act in the statute which requires that at least one of the conspirators have committed an act to effect the object of the conspiracy." *Id.* at 63 (citations omitted). The "criminal agreement itself is the *actus reus*" of the crime. *United States v. Shabani*, 513 U.S. 10, 16 (1994); *see also Braverman v. United States*, 317 U.S. 49, 53 (1942) (overt acts do not constitute "part of the crime which the statute defines and makes punishable").

Salinas recognized that RICO embodies the common law rule that, while overt acts may function as "an indispensable mode of corroborating the existence of the conspiracy," *Yates v. United States*, 354 U.S. 298, 334 (1957), those acts do not "meaningfully establish an essential element of the conspiracy," where, as is true of RICO, "there is no overt act requirement in the . . . statute." *United States v. Felix*, 503 U.S. 378, 392 (1992) (Stevens, J., concurring); *see also Shabani*, 513 U.S. at 12 (evidence of overt acts is "offered not to prove overt acts *qua* overt acts, but to prove the existence of the conspiracy"); *Yates*, 354 U.S. at 334 ("[t]he function of the overt act . . . is simply to manifest that the 'conspiracy is at work,' and is neither a project still resting solely in the minds of the conspirators nor a fully completed operation no longer in existence") (citation omitted).

3. The RICO civil suit provision, section 1964(c), affords a cause of action to persons "injured" by a "violation" of section 1962. The term "violation" in section 1964(c) has a precise meaning. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court construed the term to mean "a failure to adhere to legal requirements." *Id.* at 489. That definition is consistent with the definition of "violation" in other statutes, such as the Continuing Criminal Enterprise Act, 21 U.S.C. § 848(a). As this Court recently recognized in that context, a "violation" is "an act or conduct that is contrary to law." *Richardson v. United States*, 119 S. Ct. 1707, 1710 (1999).

Because section 1964(c) affords a cause of action only to persons injured by a "violation," a plaintiff must, at a minimum, allege that his injury flowed from the "*act* or *conduct* that is contrary to" the statute. *Richardson*, 119 S. Ct. at 1710 (emphasis added); *Sedima*, 473 U.S. at 489. Indeed, this Court recognized as much in *Sedima*, in which this Court held that a "plaintiff only has standing to sue [under section 1964(c)] if he has been injured in his business or property by the *conduct*

constituting the violation." *Sedima*, 473 U.S. at 496 (emphasis added).

4. Petitioner contends that he was "injured" by reason of a "violation" of the RICO conspiracy provision, section 1962(d). That claim is without merit. Petitioner has not been injured by the conduct constituting the violation of section 1962(d)—a mere agreement to violate the substantive provisions of 18 U.S.C. §§ 1962(a)-(c)—but by something altogether different: an overt act purportedly taken to further that agreement.

An overt act done in furtherance of a conspiracy is not "conduct constituting [a] violation" of section 1962(d). *See Sedima*, 473 U.S. at 496. As set forth in *Salinas*, the conduct constituting the offense of conspiracy is the act of agreement itself—nothing more. The damage that petitioner sustained as a result of his purportedly wrongful termination is not, therefore, injury suffered by reason of a "violation" of section 1962(d). Petitioner's injury occurred by reason of an overt act in furtherance of the conspiracy, but not by reason of the conspiracy itself.

The courts that have granted standing to plaintiffs injured by an "overt act" fail to appreciate the significance of that distinction, frequently collapsing the crucial difference between injury that results by reason of an overt act and injury that results by reason of a conspiracy. Some courts purport to gloss that distinction by emphasizing that the particular overt act was "essential" to or "closely intertwined" with the conspiracy's object. Whether an overt act was expressly done "in furtherance" of the conspiracy, *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3d Cir. 1989), "essential" to the conspiracy, *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 295 (9th Cir. 1990) (citation omitted), "critical" to the conspiracy, *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143, 153 (5th Cir. 1997), *rev'd on other grounds*, 119 S. Ct. 442 (1998), "directly related" to the conspiracy's goals, *Schiffels v. Kemper Fin. Servs., Inc.*,

978 F.2d 344, 351 (7th Cir. 1992), or "not outside the scope of [the] conspiracy," *Williams v. Hall*, 683 F. Supp. 639, 643 (E.D. Ky. 1988), is irrelevant, however, because even if the overt act would not have occurred *but for* the existence of the conspiracy, and even if the causal nexus between the conspiracy and overt act is immediate and direct, the overt act is not *itself* a "violation" of section 1962(d).

Put another way, section 1964(c) does not give a cause of action to persons injured "by reason of conduct in furtherance" of a RICO violation; it gives a cause of action to persons injured by the "conduct *constituting* the violation." *Sedima*, 473 U.S. at 496 (emphasis added). A section 1962(d) "violation" is constituted by the *agreement* of the parties to further a criminal endeavor, *see Salinas*, 552 U.S. at 63—nothing more. The plain language of the statute gives a cause of action only to persons injured by reason of that conduct.

5. Petitioner's claim that the proximate cause requirement announced in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), is the "appropriate limiting factor," Pet. Br. at 27, for determining whether a person has been "injured" under RICO, misses the point.

Petitioner's argument conflates two distinct statutory requirements: section 1964(c)'s command that a plaintiff's injury *result* from ("by reason of") a proscribed act, which is properly examined under principles of proximate causation, and section 1964(c)'s threshold requirement that a "violation" of the criminal provisions of RICO must be shown as the indispensable predicate for any type of causation analysis, "proximate" or otherwise. Proximate causation demands that there be "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. No principle of proximate causation, however, supports petitioner's attempt to disregard the limits that the legisla-

ture has established as the threshold condition to civil liability.

Thus, although the proximate causation requirement limits the extent to which a wrongdoer may be held responsible for the consequences of his wrongful conduct, petitioner may not trigger that analysis by claiming to have been injured by just *any* act. The "injurious conduct" that serves as the starting point in the analysis must be conduct that the law otherwise makes actionable. Only *after* that conduct is identified may causation analysis properly proceed.[2]

Here, the statute identifies the conduct to which the directness of the plaintiff's injury must be assessed. That conduct is a "violation" of section 1962(d)—an agreement to further a criminal endeavor. Petitioner does not purport to have suffered damage as a result of *that* conduct, but rather he claims an injury resulting from conduct "in furtherance" of it. No proximate causation analysis is necessary in this case, because petitioner has attributed injury to conduct that is not actionable under the statute. Indeed, petitioner's analysis reads the word "violation" out of section 1962(d).

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[2] The doctrine of proximate causation does not determine *in the first instance* whether conduct is wrongful. It is possible, for example, to assess whether X is the proximate cause of consequences A and B without making a judgment that X is contrary to law. Put another way, a proximal relation *alone* between conduct and harm does not *ipso facto* render that conduct wrongful (*i.e.*, that X is a proximate cause of consequences A and B does not necessarily make X wrongful). Proximate cause determines only whether a person whose conduct is *otherwise* wrongful should be held liable for the consequences of his conduct. The doctrine presupposes that the first link in the chain of causation—the starting point from which the causation measurement is taken—is a wrongful act.

In sum, petitioner's embrace of "proximate causation" does not avail petitioner much, because the conduct constituting the violation of section 1962(d)—the conduct which must be the first link in the chain of causation—is not the proximate cause of petitioner's injury. Indeed, *no one* is injured by a confederation or agreement alone. *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 386 (8th Cir. 1993) ("A nonconspirator cannot be injured in his or her business or property by a mere agreement to violate RICO"); *Schiffels*, 978 F.2d at 348 ("[A]n agreement to violate RICO, standing alone, cannot harm anybody"); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (same). A conspiracy *simpliciter* simply does not cause private injury.

Accordingly, the plain language of the statute establishes that petitioner's wrongful termination claim is not cognizable under RICO. RICO does not authorize suits for civil conspiracy.

B. Conventional Rules Of Statutory Interpretation Establish That Section 1964(c) Does Not Create A Private Right Of Action For Civil Conspiracy

The conclusion that section 1964(c) *never* confers a cause of action for conspiracy *per se* is inescapable when three traditional canons of statutory interpretation are applied to the text.

1. First, Congress "expects its statutes to be read in conformity with this Court's precedents." *United States v. Wells*, 519 U.S. 482, 495 (1997). Long before RICO was enacted, it was well understood that the criminal law takes aim at conspiracy because it "poses distinct dangers quite apart from those of the substantive offense." *Iannelli v. United States*, 420 U.S. 770, 778 (1975). Those dangers derive from the fact that conspiracy is a "partnership in crime." *Callanan v. United States*, 364 U.S. 587, 593 (1961). Concerted action makes more

likely the completion of the substantive offense and the commission of crimes unrelated to the original purpose for which the group was formed, and it "educat[es] and prepar[es] the conspirators for further and habitual criminal practices." *United States v. Rabinowich*, 238 U.S. 78, 88 (1915); *see also Pinkerton v. United States*, 328 U.S. 640, 644 (1946). Thus, although conspiracy is, at its core, an "inchoate offense," *Iannelli*, 420 U.S. at 777, it is considered to be "an offense of the gravest character" because of its *potential* for inflicting severe "injury *to the public*." *Rabinowich*, 238 U.S. at 88 (emphasis added).

A civil cause of action, by contrast, is invariably given to victims of *actual* harm. Had Congress intended to create a new cause of action for the act of reaching agreement—an act which itself causes no particularized injury to any individual—it may be presumed that "there would have been at least some mention of it in the legislative history." *Sedima*, 473 U.S. at 490. There is nothing in the legislative history, however, to suggest that Congress in enacting RICO understood itself to be creating a new cause of action for unlawful agreement.

Instead, the legislative history of the statute is replete with references to the actual harm that racketeering conduct—the target of the substantive offenses set forth at 18 U.S.C. § § 1962(a)-(c)—inflicts upon legitimate businesses. That legislative history was painstakingly reviewed both by the majority and dissenters in *Sedima*, *see* 473 U.S. at 486-88, 510-20, and it is not necessary to rehash that history here except to note that *both* the majority *and* dissent agreed that the civil suit provision was motivated by the notion that "[t]hose who have been wronged by organized crime should at least be given access to a legal remedy," *id.* at 487, 515-16, and that Senator Hruska, a principal sponsor of the bill, thought the civil remedy necessary because "the honest businessman who has been damaged by unfair competition from the racketeering businessman . . . does not have

adequate civil remedies" to gain him recompense for his injuries. *Id.* at 516 (citation and quotation omitted).

That legislative history, while not conclusive, evinces preoccupation with *actual harm* suffered by legitimate businesspeople by virtue of the racketeering activity proscribed in sections 1962(a), (b), and (c). Nothing in the legislative history suggests that Congress contemplated the interplay between section 1964(c) and section 1962(d), much less intended to create out of whole cloth a theretofore unknown *civil* cause of action for conspiracy.

2. Congress also must be understood to have legislated against the background of the common law "except when a statutory purpose to the contrary is evident." *Astoria Federal Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation and citation omitted). At common law, civil conspiracy was not, by itself, an independent cause of action.[3] "Being a civil remedy, the

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[3] *Robinson v. Parks*, 24 A. 411, 413 (Md. Ct. App. 1892) ("[T]he simple act of conspiracy does not furnish a substantive ground of action"); *Domchick v. Greenbelt Cons. Servs., Inc.*, 87 A.2d 831, 834 (Md. Ct. App. 1952) ("No action in tort lies for conspiracy to do something unless the acts actually done, if done by one person, would constitute a tort"); *Beechley v. Mulville*, 70 N.W. 107, 110 (Iowa 1897) ("The general rule is that a conspiracy cannot be made the subject of a civil action unless something is done which without the conspiracy would give the right of action") (quotation marks and citation omitted); *Root v. Rose*, 72 N.W. 1022, 1023 (N.D. 1897) ("The charge of conspiracy adds nothing to the case. A conspiracy, if proved, might augment the damages; but it would not of itself transmute nonactionable into actionable facts"); *Delz v. Winfree*, 16 S.W. 111, 111 (Tex. 1891) ("[A] conspiracy cannot be made the subject of a civil action, although damages result, unless something is done which, without the conspiracy, would give a right of action"); *Jayne v. Drorbaugh*, 17 N.W. 433, 437 (Iowa 1883) (same); *Diver*

gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." *James v. Evans*, 149 F. 136, 140 (3d Cir. 1906).[4] The doctrine was no more than a "convenient and proper mode of alleging [a] combination and [united] action" on the part of multiple tortfeasors. *City of Boston v. Simmons*, 23 N.E. 210, 211 (Mass. 1890).[5]

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v. Miller, 148 A. 291, 292 (Del. Super. Ct. 1929) ("If, however, there be no right of action in the plaintiff against the defendants, or either of them, independent of the conspiracy, there can be no recovery though a conspiracy be alleged").

4 *See also Porter v. Mack*, 40 S.E. 459, 460 (W. Va. 1901) ("The gist of the action is the injury produced"); *Van Horn v. Van Horn*, 28 A. 669, 670 (N.J. 1894) ("[I]n an action on the case for conspiracy, the gist of the action is not the conspiracy, but the damage done to the plaintiff. . . . [C]onspiracy is not the groundwork of the action, but the damages done to the party"); *City of Boston*, 23 N.E. at 211 ("The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff, and the damage thereby done it wrongfully"); *Von Au v. Magenheimer*, 110 N.Y.S. 629, 632 (App. Div. 1908) ("In a civil action for conspiracy the gist of the action is the damage, not the conspiracy").

5 *See also Robinson v. Van Hooser*, 196 F. 620, 623 (6th Cir. 1912) ("Since to hold defendants liable in actions like this it is necessary to prove a combination and united action on their part, the conspiracy averments afford a convenient means of alleging such combination and action"); *Von Au*, 110 N.Y.S. at 632 ("[T]he averment and proof of conspiracy is only important to join all the defendants and hold them responsible for the acts and declarations of each"); *Robinson v. Parks*, 24 A. 411, 413 (Md. Ct. App. 1892) ("The party wronged [by a tort] may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it").

It would be wholly incongruous for Congress to have enacted section 1962(d) on "the common-law footing," *Nash v. United States*, 229 U.S. 373, 378 (1913)—that is, by defining the offense as a conspiracy *simpliciter*, *Salinas*, 552 U.S. at 63—and, at the same time, to have effected a radical transformation of the common law by creating a novel and unprecedented cause of action for civil conspiracy. That result is all the more anomalous given that the crime of conspiracy has been targeted historically because it is an inchoate offense inherently dangerous to the *public*, and not a crime that in and of itself causes ascertainable *private* injury to anyone. *Iannelli*, 420 U.S. at 770; *Rabinowich*, 238 U.S. at 88.

3. Congress "will not be deemed to have significantly changed the federal-state balance" absent a clear sign of legislative intent. *United States v. Culbert*, 435 U.S. 371, 379 (1978) (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). Petitioner's view would sanction the proposition that Congress intended to federalize an enormous range of conduct historically regulated by the states and to impose liability on an unimaginably broad range of conduct—the universe of "overt acts"—heretofore thought to have been the proper concern of state law enforcement, if not wholly innocuous.

That petitioner has brought a claim for "wrongful termination" under RICO illustrates this danger perfectly. Florida common law does not recognize the tort of wrongful termination. *See Scott v. Otis Elevator Co.*, 572 So. 2d 902, 903 (Fla. 1990); *Smith v. Peizo Tech. & Prof'l Admrs.*, 427 So. 2d 182, 184 (Fla. 1993); *DeMarco v. Publix Super Markets, Inc.*, 384 So. 2d 1253 (Fla. 1980).[6] By dressing up his wrongful termination

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6 In 1991, Florida enacted the Whistle Blower's Act, Fla. Stat. §§ 448.101-05, prohibiting retaliatory termination in the private sector. The Supreme Court of Florida has held that the statute does not apply retroactively. *See Arrow Air, Inc.*

claim as an "overt act" in furtherance of a section 1962(d) conspiracy, however, petitioner has effectively bypassed that State's decision not to protect against the type of injury he purports to have suffered.

Many other examples abound. At common law, as well as under the federal conspiracy statute, 18 U.S.C. § 371, overt acts can be wholly innocuous. *See* Wayne R. LaFave & Austin W. Scott, CRIMINAL LAW 549 (2d ed. 1986) ("[V]irtually any act will satisfy the overt act requirement"); *see also United States v. O'Brien*, 972 F.2d 47, 52-53 (3d Cir. 1992) (citations omitted) ("an interview with a lawyer, attending a lawful meeting, and making a phone call, have all been held to be overt acts sufficient to support a conspiracy conviction") (citations omitted).[7] The gloss on section 1964(c) urged by petitioner effectively would subject such acts to civil liability provided they were "essential to" or "directly related" to a conspiracy, rendering RICO a "font of tort law," *Paul v. Davis*, 424 U.S. 693, 717 (1976), unrivaled by any other federal statute or constitutional provision.

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v. Walsh, 645 So. 2d 422, 425 (Fla. 1994). Accordingly, the statute would not provide a cause of action to petitioner, who was terminated in 1988. Petitioner, however, is free to assert available contract claims, if any, in state court.

7 That notion is reflected in the Department of Justice RICO manual, which explicitly distinguishes "racketeering acts," which "must be violations of the offenses listed in 18 U.S.C. § 1961," and overt acts, which "should be ordinary actions, such as meetings, conversations, and other general activities." THE DEPARTMENT OF JUSTICE MANUAL § 9-110A.1 00 at 99-100 (1991-1 Supp.). The Manual instructs prosecutors that "[a]lthough they may be criminal in nature, the overt acts, unlike the racketeering acts, should not be alleged as criminal offenses. It is extremely important to avoid confusing these two concepts." *Id.*

Congress could not possibly have intended such an anomalous result.

C. The Plain Meaning Of The Statute Does Not Render Any Portion Of The Statute Mere Surplusage Or Produce An Absurd Result

1. Petitioner's principal objection to according the statute its plain meaning is that such a construction purportedly would render section 1962(d) "superfluous" in the civil setting. Because a plaintiff is never "injured" by reason of a "conspiracy" *alone*, to have a cause of action under section 1964(c) a plaintiff would be required to demonstrate injury by reason of a violation of one of sections 1962(a)-(c). According to petitioner, this would render section 1962(d) "superfluous" for civil plaintiffs. *See* Pet. Br. at 19.

That objection is not persuasive. Although this Court does not construe statutes in a manner that "render[s] their provisions mere surplusage," *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997), that principle operates to bar interpretations that render statutory words "of no consequence" in all of the statute's applications. *See Ratzlaf v. United States*, 510 U.S. 135, 141 (1994). This Court has never endorsed the sweeping proposition that courts must construe each provision in a legislative enactment in a manner that will render that provision pertinent to each conceivable application of the act.

That principle would be especially unwarranted and unworkable if applied to RICO, the text and structure of which mandate substantial interplay between the civil remedies provision in section 1964, the statutory violations enumerated in 1962, and the predicate acts and operative terms defined in section 1961. Complete integration and complementarity of one provision to another under such a complex statutory scheme is neither practicable nor expected.

Indeed, this Court already has rejected a similar argument in the RICO context. In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that the term "enterprise" as defined in section 1961(4) refers to both legitimate and illegitimate enterprises, rejecting the claim, similar to that raised by petitioner here, that the plain meaning would "create several internal inconsistencies in the Act." 452 U.S. at 582. The court of appeals had held that the term refers only to "legitimate enterprises," reasoning:

> [Since] a "pattern of racketeering" can itself be an "enterprise" for purposes of section 1962(c), then the two phrases "employed by or associated with any enterprise" and "the conduct of such enterprise's affairs through [a pattern of racketeering activity]" add nothing to the meaning of the section. The words of the statute are coherent and logical only if they are read as applying to legitimate enterprises.

452 U.S. at 582 (quoting *United States v. Turkette,* 632 F.2d 896, 899 (1st Cir. 1980)). The Court dismissed that argument as resting on the faulty premise that a "pattern of racketeering" is an "enterprise." *Id.* at 583. Moreover, the Court pointedly observed, "even if that were not the case, the Court of Appeals' position on this point is of little force. *Language in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent.*" 452 U.S. at 583 n.5 (emphasis added).

That principle applies to this case. The plain meaning of the statute establishes only that a criminal conspiracy cannot be the predicate "violation" for a cause of action under section 1964(c). Section 1962(d) is hardly "surplusage" under that interpretation. Its powerful sweep operates will full force, and to full effect, in the criminal setting.

Indeed, *Turkette* explicitly rejected the notion that the existence of the civil remedies bears on the scope of the criminal provisions of section 1962. The First Circuit supported its "legitimate enterprise" requirement in that case in part on the ground that various civil remedies were provided by section 1964, including divestiture, dissolution, reorganization, restrictions on future activities by violators of RICO, and treble damages, and that these remedies would only have utility with respect to legitimate enterprises. 452 U.S. at 585. This Court concluded that "[e]ven if one or more of the civil remedies might be inapplicable to a particular criminal enterprise, this fact would not serve to limit the enterprise concept." *Id.* "Congress has provided civil remedies," the Court observed, "*for use when the circumstances so warrant.* It is untenable to argue that their existence limits the scope of the criminal provisions." *Id.* (emphasis added).

Turkette thus soundly rejects the interpretive directive that petitioner asserts to be dispositive here. Congress has provided a cause of action in section 1964(c) for persons injured by reason of a "violation" of the RICO criminal provisions. That section, however, in no way alters "the scope of the criminal provisions." *Turkette*, 452 U.S. at 585. The scope of RICO conspiracy under section 1962(d) was settled in *Salinas*, and neither the existence of section 1964(c), nor petitioner's faulty "surplusage" argument, alter the fact that petitioner has not been injured by a "violation" of that provision.

D. Summary Judgment Was Appropriately Entered Against Petitioner

Summary judgment was appropriately entered against petitioner. Summary judgment is proper where the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23

(1986). That is the case here. Petitioner has adduced no evidence that he has been injured by reason of a "violation" of the RICO criminal conspiracy provision. Petitioner seeks damages for injury he claims to have incurred as a result of his purportedly wrongful termination; he seeks no damages incurred by reason of the respondents' purportedly unlawful agreement, which is what section 1962(d) prohibits. Petitioner therefore states no cause of action under section 1964(c), and judgment was properly entered against him.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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